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No. 847

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In the Supreme Court of the United States

OCTOBER TERM, 1959

EDMUND MILTON JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-26, Vol. V, 1-11)[1] is reported at 275 F. 2d 332.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1960. The petition for a writ of

[1] The record consists of five volumes. Volumes II and III, which are consecutively paginated, constitute the transcript of proceedings in the district court, and will be referred to as "Tr." The remaining volumes will be referred to by their appropriate volume numbers.

certiorari was filed on April 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show that petitioner was served with a subpoena and wilfully failed to appear.

2. Whether petitioner was entitled to a jury trial in a contempt of court proceeding which resulted from disobedience of a subpoena issued in a case where the United States was a party.

3. Whether petitioner's eighteen-month sentence was an abuse of the trial court's discretion.

STATUTES AND RULE INVOLVED

Rule 17(g), F. R. Crim. P., provides:

> *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 402 provides in pertinent part:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, * * * if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> * * * *
>
> This section shall not be construed to relate to contempts committed in * * * disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

18 U.S.C. 3691 provides:

> Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under

the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

STATEMENT

On March 24, 1959, the United States Attorney for the District of Minnesota applied to the district court for a notice and order to show cause why Harold Nevers and petitioner Edmund James should not be held in contempt of court. The application alleged that the petitioner had been subpoenaed on September 20, 1958, to appear as a witness for the United States in the criminal case of *Lupino* v. *United States*, 268 F. 2d 799 (C.A. 8), certiorari denied, 361 U.S. 834, that the petitioner wilfully disobeyed the subpoena, and that, pursuant to an agreement between Nevers and the petitioner, Nevers appeared at the United States Attorney's office and claimed that he, not the petitioner, had been served with the subpoena (Vol. I, 1-3). An order to show cause was issued, and petitioner and Nevers were subsequently arrested. Following a trial without a jury—the jury

demand of the defendants having been denied—petitioner and Nevers were found guilty, and sentenced to serve eighteen- and six-month prison terms respectively (Tr. 19-20, 227, 310-311, 315-316). On appeal, the court of appeals unanimously dismissed Nevers' appeal and affirmed petitioner's conviction. Nevers does not seek review of his conviction in this Court.

The evidence may be summarized as follows:

1. On Saturday, September 20, 1958, shortly after 8 p.m., Deputy United States Marshal Mortenson entered "Jack's Cafe" in St. Paul with the district court subpoena for the petitioner (Tr. 29-31, 49). A few minutes later, the petitioner, whom Mortenson knew,[2] entered the bar-room with a salesman (Tr. 32-34). Mortenson inquired of the bartender, "That's Mr. James?", to which the bartender replied in the affirmative (Tr. 34, 38, 50, 52, 55). Mortenson walked over to the petitioner and identified himself as a Deputy United States Marshal. After touching petitioner's hand with the subpoena, Mortenson placed it on the bar in front of the petitioner and walked away (Tr. 35-37, 53). Petitioner then called the bartender over and spoke with him. Shortly thereafter, the bartender approached Mortenson and said that the petitioner "didn't want it," that the party served "wasn't Eddy James" (Tr. 38, 51, 53). Mortenson turned away, and walked out of the establishment (Tr. 51, 54).

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[2] Mortenson testified that in 1942 he had brought the petitioner before a United States Commissioner, and acted as a guard in transporting the petitioner to a federal penitentiary (Tr. 22-27).

On October 2, 1958, Nevers appeared in the United States Attorney's office with the subpoena, claiming that he, not the petitioner, had been served with it. At that time, Mortenson told an Assistant United States Attorney that he did not serve Nevers and that he had never seen Nevers before (Tr. 45-46). Petitioner did not appear in the district court in response to the subpoena (Tr. 63-66).

At the contempt trial, Mortenson testified that he had never seen Nevers until October 2, 1958 (Tr. 39-41, 47, 56). Mortenson correctly identified the petitioner and Nevers in court (Tr. 34,43). Petitioner testified that he was not served (Tr. 143), while Nevers testified that he was served with the subpoena in the middle of the week (Tr. 80, 97-100). Mr. and Mrs. McDonald testified that, in September or "in the fall," a man of the "approximate * * * size" of Mortenson threw a paper on the bar in front of Nevers in "Jack's Cafe," that Nevers became irritated about being mistaken for James, and that they believed these events to have transpired either on a Tuesday or other than a Friday or Saturday (Tr. 107-112, 114, 116-118, 121-122, 129-134, 140, 141). The court found both petitioner and Nevers guilty (Tr. 222).

2. On June 11, 1959, pursuant to defendant's motion, the trial judge reopened the case for the purpose of taking additional testimony. On behalf of the defendants, Gerald Driscoll testified that he had known the petitioner for about 12 years, and that Nevers was served with a paper in Jack's Cafe on a Wednesday in September, October, or November

(Tr. 230-234, 259-262). The Government called George Russell, the bartender in Jack's Cafe during the period in question, who testified that the petitioner was served with a subpoena in "Jack's Cafe" on a Friday or Saturday evening in September 1958 (Tr. 279, 282-283). Russell also testified that he pointed out the petitioner to the Marshal (Tr. 280-281), that he overheard the petitioner and Nevers planning that Nevers answer the subpoena (Tr. 284, 289-292), and that the statement which he signed in front of a local police officer and an F.B.I. agent was "true," except for that portion of the statement which indicated that he had gone to the defendant's attorney regarding petitioner's case.[4] Russell's statement, which was admitted into evidence, recited that the Marshal served the petitioner with the subpoena, that the petitioner and Nevers planned to have Nevers answer the subpoena, that Russell remained in an apartment for two days above "Jack's Cafe" during petitioner's trial because the petitioner did not want him to testify at the trial, and that, after the trial, he and Nevers went to the office of attorney Springer where he (Russell) told Springer that he did not know anything about the subpoena (Vol. I, 43-45).

At the conclusion of the hearing to take additional evidence, the trial judge stated to the petitioner (Tr.

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[3] Driscoll testified that he was twice convicted of felonies and that he knew each of the defendants in the *Lupino* case (Tr. 244-247).

[4] At the conclusion of Russell's testimony, the Government stipulated that Russell did go to the office of attorney Springer (Tr. 296-297).

308), "If I never was convinced of your guilt, I was certainly convinced this morning of your guilt." Petitioner, prior to the imposition of sentence, told the court that he had not been "in trouble since 1940" (Tr. 302). The court then asked the petitioner questions about matters included in the "probation report" and matters raised at the trial (Tr. 302-310).

ARGUMENT

1. The facts set forth in the Statement show that petitioner's attack (Pet. 10-13) on the sufficiency of the evidence is without merit. The district court, having heard the conflicting testimony, was in the best position to judge the credibility of the witnesses. See *Nilva* v. *United States*, 352 U.S. 385, 395. As the court below noted, after thoroughly reviewing the evidence (Pet. App. 18-22), "the trial court was completely justified in finding beyond a reasonable doubt that the subpoena was served upon James and that he willfully disobeyed the command to appear as a witness in the *Lupino* trial" (Pet. App. 22). This conduct in itself was a deliberate flaunting of federal process and therefore constituted contempt of the district court. Certainly, it was not necessary to serve petitioner a second time with the subpoena, whether or not this was feasible.

2. Petitioner was not entitled to a jury trial. It has long been settled that there is no constitutional right to trial by jury in criminal contempt proceedings for wilful disobedience of an order of the court. *Eilenbecker* v. *Plymouth County*, 134 U.S. 31, 38-39; *In re Debs*, 158 U.S. 564, 594-595; *Green* v. *United*

States, 356 U.S. 165, 183-187. And Rule 17(g), F. R. Crim. P., *supra*, specifically provides that wilful disobedience of a subpoena may be punishable as contempt. See *Nilva* v. *United States*, *supra*, 352 U.S. at 392. While 18 U.S.C. 402 and 3691, *supra*, pp. 3-4, confer the right to trial by jury in criminal contempt cases involving disobedience of the court's process or command which also constitutes a federal or state offense, these provisions are expressly inapplicable when the process or command has been "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." See *Goldfine* v. *United States*, 268 F. 2d 941, 946-947 (C.A. 1), petition for certiorari pending, No. 396, this Term. The present case involves this precise situation.

3. There is no merit to petitioner's further contention (Pet. 13-14) that his sentence of eighteen months' imprisonment constitutes an abuse of the trial court's discretion. The evaluation of the particular sentence, which is the primary function of the district court, depends on the peculiarities of each case and especially on " 'the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behavior.' " *Yates* v. *United States*, 355 U.S. 66, 75. Petitioner's conduct was not only motivated by a desire to obstruct justice in the *Lupino* case, but was a scheme to subvert the process of the court. After "careful consideration" of the sentence, the court below concluded that the trial court did not abuse its discretion: "The contempt here was, by any criterion, test or yardstick, wanton, nefarious and

reprehensible" (Pet. App. 25). Cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 303. Considered in this light, petitioner's eighteen-month sentence is by no means extraordinary in its severity as compared to other criminal contempt cases. See, *e.g.*, *Green* v. *United States*, *supra*, 356 U.S. at 187-189 (three years); *Hill* v. *United States ex rel. Weiner*, 300 U.S. 105, 106 (two years); *Lopiparo* v. *United States*, 216 F. 2d 87, 92 (C.A. 8), certiorari denied, 348 U.S. 916 (eighteen months); *Conley* v. *United States*, 59 F. 2d 929, 930, 936 (C.A. 8) (two years); *Reich* v. *United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004 (two years).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1960.

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